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14
15 UNITED STATES DISTRICT COURT
16
17 FOR THE NORTHERN DISTRICT OF CALIFORNIA
18
19 OAKLAND DIVISION

20 EPIC GAMES, INC.,

21 Plaintiff, Counter-
22 defendant

23 v.

24 APPLE INC.,

25 Defendant,
26 Counterclaimant.

27 Case No. 4:20-cv-05640-YGR-TSH

28 **ADMINISTRATIVE MOTION TO SEAL
THE COURTROOM DURING
PRESENTATION OF CERTAIN
CONFIDENTIAL MATERIAL AT TRIAL**

Introduction

In this antitrust suit, Apple Inc. (“Apple”) has produced to Epic Games, Inc. (“Epic”) documents containing Apple’s sensitive non-public financial information. Thanks in significant part to the protective order entered by the Court, Apple has done so largely without troubling the Court with many of the concerns that Apple might normally have about these disclosures. And, recognizing that the Court has expressed a preference for a public trial, Apple has not objected—and does not plan to object—to the presentation of most evidence at the upcoming bench trial. Like the Court, Apple believes the public interest is best served by a trial that is as open and transparent as possible.¹

However, Apple respectfully requests that the courtroom be closed during the discussion of a particular topic: the purported “profitability” of the App Store on a standalone basis, as opined on by Epic’s accountant, Mr. Barnes. To be clear, Apple is not objecting to the Court’s consideration of this evidence for whatever probative value it may have in the context of this trial. Rather, Apple is concerned that analysts, investors, reporters, and others in the marketplace could misinterpret the public disclosure of non-public, unaudited financial information. Apple is a publicly traded company whose audited financials are a matter of public record. Under the securities laws, SEC guidance, and Public Company Accounting Oversight Board standards, investment decisions ought to be made on the basis of such public information. Apple does not—and is not required to under the governing regulatory regime—publicly disclose the unaudited financial information that is the subject of Mr. Barnes’ testimony. Apple respectfully submits that this evidence should remain non-public so as not to unduly confuse the securities markets and participants in those markets, including the many pension funds, mutual funds, and other ordinary investors who own Apple stock.

Specifically, Apple requests that the courtroom be closed for: (1) the entirety of the testimony of Mr. Barnes, whose testimony is devoted to the non-public financial information at issue; (2) any testimony from other expert witnesses adopting or responding to Mr. Barnes' opinions; and (3) any testimony from fact witnesses addressing the subject matter of Mr. Barnes' opinions or the documents on which he relied. In addition, Apple requests that Epic be directed not to refer to this information in

¹ Apple reserves the right to submit a future request to the Court that the courtroom be closed during discussion of a limited subset of exhibits that contain highly confidential business information.

1 its opening statement or in any demonstratives made available on the public record, and that any
 2 exhibits admitted into evidence on this subject be and remain redacted.

3 **Legal Standard**

4 While there is a common law right of public access to judicial proceedings, that right is “not
 5 absolute.” *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 598 (1978). A party seeking to seal a
 6 judicial record may overcome the presumption in favor of access by “articulat[ing] justifications for
 7 sealing that outweigh the public policies favoring disclosure.” *In re Incretin-Based Therapies Prod.*
 8 *Liab. Litig.*, No. 13-MD-2452, 2021 WL 873290, at *1 (S.D. Cal. Mar. 9, 2021) (citing *Kamakana v.*
 9 *City & Cty. of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006)). Put differently, the party must present
 10 “compelling reasons” to justify the “closure of a courtroom during trial.” *In re LDK Solar Sec. Litig.*,
 11 No. 07-CV-5182, 2010 WL 724809, at *1 (N.D. Cal. Mar. 1, 2010).

12 “In general, ‘compelling reasons’ sufficient to outweigh the public’s interest in disclosure and
 13 justify sealing court records exist when such ‘court files might have become a vehicle for improper
 14 purposes,’ such as the use of records to gratify private spite, promote public scandal, circulate libelous
 15 statements, or release trade secrets.” *Kamakana*, 447 F.3d at 1179 (quoting *Nixon*, 435 U.S. at 598).

16 **Discussion**

17 Apple is the world’s most valuable publicly traded company. Its market capitalization exceeds
 18 \$2 trillion and its average daily trading volume exceeds 100 million shares. Apple stock is owned and
 19 traded by mutual funds, pension funds, institutional investors, and individual investors. It is one of the
 20 most closely watched technology stocks on Wall Street and on Main Street. *See, e.g.*, Bloomberg
 21 Quint, *Apple Could Hit \$3 Trillion Market Valuation, Analysts Say* (Mar. 12, 2021)
 22 [https://www.bloombergquint.com/onweb/apple-could-reach-a-3-trillion-market-valuation-analysts-](https://www.bloombergquint.com/onweb/apple-could-reach-a-3-trillion-market-valuation-analysts-say)
 23 say.

24 By this motion, Apple seeks to prevent any confusion on the part of the investing public about
 25 what certain trial evidence might (or might not) mean for Apple’s financial performance and, thus, the
 26 trading value of its stock. Courts have recognized that “the potential to confuse and mislead the public”
 27 can “amount to compelling reasons to maintain the [business] information at issue under seal” where
 28 disclosure “may result in more harm than good.” *Incretin-Based Therapies*, 2021 WL 873290, at *3;

1 *see also United States v. Amodeo*, 71 F.3d 1044, 1052 (2d Cir. 1995) (declining to release information
 2 that was “more likely to mislead than to inform the public”).

3 One key policy of the federal securities laws is to ensure that investors have available to them
 4 accurate and consistent financial statements by which to assess share value and make investment
 5 decisions. Since the Sarbanes-Oxley Act, most public companies have been required to prepare
 6 financial statements audited by an independent accounting firm. Apple provides such statements,
 7 prepared using Generally Accepted Accounting Principles (“GAAP”), to its investors on a regular
 8 basis, consistent with its statutory and regulatory obligations. *See, e.g.*, Apple, *Investor Relations –*
 9 *SEC Filings*, <https://investor.apple.com/sec-filings/default.aspx>.

10 This orderly, regulated process of financial information disclosure could be disrupted by public
 11 disclosure of Mr. Barnes’ opinions regarding the purported “profitability” of the App Store. As the
 12 Court observed at a recent hearing, the news media have been following this case extremely closely,
 13 and have at times released misleading accounts of proceedings *while those proceedings are still*
 14 *ongoing*. *See* Hr’g Tr. at 30:19–25 (Apr. 21, 2021). The disclosure of Mr. Barnes’ seemingly
 15 concrete—but, as Apple will show at trial, deeply flawed—financial metrics about the App Store’s
 16 profitability, based entirely on non-public information, may be misinterpreted by the media and the
 17 investing public. *Cf. ATLC, Ltd. v. Eastman Kodak Co.*, No. 06-CV-0416, 2007 WL 9677272, at *5
 18 (M.D. Fl. June 26, 2007) (“Because . . . internal financial information is not prepared in accordance
 19 with [GAAP], nor accompanied by the required disclosures if it were to be made public, this
 20 information could mislead financial analysts and the investing public.”). As a result, allowing him to
 21 testify in open court about his calculations could inject unaudited and non-public financial metrics into
 22 the total mix of information available to investors, analysts, and others seeking to learn about Apple
 23 and its business.

24 Dissemination of Mr. Barnes’ calculations could confuse market participants. For instance, the
 25 public might attempt to compare Mr. Barnes’ figures, which are based on internal, unaudited analyses
 26 prepared for different purposes, to Apple’s audited financial reports—which are prepared on a
 27 company-wide basis in accordance with applicable accounting standards. This exercise could lead
 28 investors to make trading decisions based on this non-public information. It seems likely that

1 disclosure of Mr. Barnes' calculations, and the associated testimony, could ultimately do significantly
 2 "more harm than good," *Incretin-Based Therapies*, 2021 WL 873290, at *3, to the integrity of Apple's
 3 stock price. As one court in this Circuit put it, closure of the courtroom is appropriate where disclosure
 4 of sensitive information "could have a devastating financial impact on the parties (and third parties) if
 5 revealed." *St. Alphonsus Med. Ctr. v. St. Luke's Health Sys., Ltd.*, 2013 WL 5883737, at *1 (D. Idaho
 6 Oct. 18, 2013).

7 Disclosure of the non-public financial information at issue could have these significant negative
 8 consequences despite not advancing in any meaningful way the *purpose* of public disclosure of trial
 9 proceedings—the promotion of the "public interest in understanding the judicial process." *Pintos v.*
 10 *Pacific Creditors Ass'n*, 605 F.3d 665, 659 (9th Cir. 2010). Mr. Barnes' calculations are relevant, if at
 11 all, to only a single sub-element of a subset of Epic's claims, and are not crucial to the public's
 12 understanding of this case or the issues it presents. Epic itself estimates that his direct examination
 13 will last only 10 minutes. His testimony in no way represents the "core of [Epic's] antitrust claims
 14 against" Apple. *Polaris Innovations Ltd. v. Kingston Tech. Co.*, No. 16-CV-0300, 2017 WL 2806897,
 15 at *8 (C.D. Cal. Mar 30, 2017). There is "little value to the public in" making this testimony public.
 16 *Foran v. Ulthera, Inc.*, No. 20-CV-0267, 2020 WL 3047789, at *2 (E.D. Cal. June 8, 2020); *cf. Apple*
 17 *Inc. v. Samsung Elec. Co., Ltd.*, 727 F.3d 1214, 1226 (Fed. Cir. 2013) (concluding that "the financial
 18 information at issue" was "not essential to the public's understanding of the" legal issues and that "the
 19 public therefore has minimal interest in this information").

20 In fact, as Apple has pointed out in its Proposed Findings of Fact and Conclusions of Law, data
 21 about profitability is of little importance, legally or economically, to the Court's evaluation of market
 22 power. *See, e.g.*, Dkt. 405 at 107–08, ¶¶ 484–92. Moreover, Mr. Barnes's calculations are simply
 23 wrong because the sources on which he relied only cover a fraction of the costs associated with running
 24 the App Store, particularly since there are substantial joint costs between Apple's hardware and
 25 software businesses. *Id.* at 107, ¶ 480. For example, Mr. Barnes "uses a revenue-based allocation of
 26 joint costs" in his calculations, which is a "very poor indicator of the extent to which [the App Store]
 27 benefits from various joint costs, such as research and development or marketing." *Id.* at 106, ¶ 479.3.
 28

1 Hence, the risks of disclosure far outweigh any competing interest in the public's learning this
2 information.

3 Nor would Epic be prejudiced in any way by being directed not to refer to this information in
4 its opening statement or in any demonstratives made available on the public record. The Court will
5 still have full access to the information, and can consider it for whatever merit or lack thereof it might
6 have.

7 In sum, the existence of a “general right to inspect and copy public records and documents” and
8 observe public proceedings, *Nixon*, 435 U.S. at 597–98, does not mandate that this Court allow its
9 courtroom to become a market mover. Preventing the public confusion, and potential economic harm,
10 that could result from disclosure of Mr. Barnes’ calculations is a compelling reason to close the
11 courtroom during discussions of the App Store’s profitability.

12 **Conclusion**

13 For the foregoing reasons, the Court should close the courtroom during the presentation of any
14 information about the App Store’s “profitability” at trial. The Court should also direct Epic not to refer
15 to this information in its opening statement or in any demonstratives made available on the public
16 record, and order that any exhibits admitted into evidence on this subject be and remain redacted.

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